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State v. Mauro Appellant's Reply Brief Dckt. 44232

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 44232
)	
v.)	KOOTENAI COUNTY NO.
)	CR 2015-4303
JOSEPH ANTHONY MAURO,)	
)	REPLY BRIEF
Defendant-Appellant.)	
_____)	

REPLY BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI**

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

Mr. Mauro asserts the prosecutor committed misconduct in this case by misstating the law to the jury when she told the jurors in rebuttal that they were not being asked to consider certain facts, even though those facts were actually relevant to one of the elements of the charged offense. The State responds that, because the prosecutor was trying to respond to defense counsel's closing argument, the prosecutor's argument was appropriate. The State's response is unpersuasive. Regardless of whether the prosecutor was trying to respond to defense counsel's arguments, given the context of this case, the prosecutor's rebuttal argument still misstated the law, which amounts to misconduct. Furthermore, in attempting to claim the error was harmless, the State argued under the wrong standard. The position it took in that regard is directly contrary to United States Supreme Court and Idaho Supreme Court precedent.

As such, this Court should vacate the verdict and judgment of conviction and remand this case for a new trial.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Mauro's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Whether the prosecutor committed misconduct by misstating the law to the jury.

ARGUMENT

The Prosecutor Committed Misconduct By Misstating The Law To The Jury

Contrary to the State's assertion, that Mr. Mauro is evaluating the prosecutor's misstatement of the law in isolation (see Resp. Br., p.5), the error in this case is actually made evident by the context of the case as a whole – the charge filed by the prosecutor, the evidence introduced at trial, and the defense theory of the case. The State alleged Mr. Mauro was a principal of insurance fraud on the basis of accomplice liability. (R., pp.29-30.) The Idaho Supreme Court and Idaho Court of Appeals have made it clear that such liability exists due to the fact that the accomplice shares the criminal intent of the principal. See, e.g., *State v. Scroggins*, 110 Idaho 380, 386 (1985); *State v. Mitchell*, 146 Idaho 378, 383 (Ct. App. 2008). Therefore, the State has to prove the fact that the accomplice shared the criminal intent of the principal as an element of the offense under the accomplice theory of liability. *Id.* “[M]ere knowledge of a crime or assent or acquiescence in its commission does not create accomplice liability through aiding and abetting.” *Mitchell*, 146 Idaho at 383. Thus, the context of defense counsel's argument was that, because the State had not proved Ms. Holloway's intent, the evidence the State presented at trial did not show Mr. Mauro shared the criminal intent of the principal, and thus, the State failed to prove Mr. Mauro guilty beyond a reasonable doubt under the charged theory of accomplice liability. (Tr., p.231, L.23 - p.233, L.8.)

The prosecutor was certainly able to respond to that argument in rebuttal, and, as the State contends, insofar as she was asking the jury to apply common sense to the defense theory of the case, that argument was not improper. See, e.g.,

State v. Wheeler, 149 Idaho 364, 370 (Ct. App. 2010). However, the point where the prosecutor went beyond that permissible scope of argument and committed misconduct in this case was when she told the jury it did not have to consider facts which were relevant to the intent element of the charged offense. (Tr., p.235, Ls.1-2 (arguing Jury Instruction 17 (the elements instruction) “does not ask you to consider her [Ms. Holloway’s] knowledge”). Since the State had to prove a shared criminal intent as an element of the offence, and not just that Mr. Mauro had knowledge that a crime was being committed, *Mitchell*, 146 Idaho at 383, the prosecutor’s argument – that Ms. Holloway’s knowledge as the principal was not at issue – misstated the law. Thus, the prosecutor’s argument, in context, constitutes misconduct.

Additionally, understanding the context of the argument reveals the defense theory of this case was not nonsensical. (See Resp. Br., p.6 (questioning the wisdom of the defense theory at trial).) It simply presents the odd scenario where defense counsel was asking the jury to make its decision based on certain prosecution evidence (the sworn statement Ms. Holloway made to the insurance company (see Exhibits, p.1)), even though that evidence conflicted with statements Mr. Mauro had made to investigators. Whether or not the State agrees with trial counsel’s view of the evidence or the argument he made as a result is beside the point. The point, the error in this case, is that, in trying to respond to defense counsel’s argument in that regard, the prosecutor told the jurors they did not have to consider facts which were relevant to one of the elements of this particular charge of accomplice liability. That error exists regardless of whether the defense theory is unconventional.

However, even if a defense theory is nonsensical, that is not an excuse for the prosecutor to commit misconduct. “The desire for success should never induce [the prosecutor] to endeavor to obtain a verdict by arguments based on anything except the evidence in the case and the conclusions legitimately deducible from the law applicable to the same.” *State v. Phillips*, 144 Idaho 82, 87 (Ct. App. 2007) (quoting *State v. Irwin*, 9 Idaho 35, 43-44 (1903)); cf. *State v. Ellington*, 151 Idaho 53, 62-63 (2011) (finding misconduct in the means the prosecutor used in presenting evidence, regardless of the potentially-legitimate ends it was trying to achieve by presenting that evidence). Thus, the prosecutor’s misstatement of the law, in context, still amounts to misconduct.

In regard to whether the prosecutor actually misstated the law, the State only argues that, philosophically, the ultimate good *Scroggins* and *Mitchell* are meant to serve (the “*summum bonum*”) is the conviction of accomplices as though they were the principal. (Resp. Br., p.7.) It then argues that, because the prosecutor’s argument was in line with that philosophical perspective, the prosecutor did not misstate the law. (Resp. Br., pp.7-8.) That assertion is unpersuasive because it fails to appreciate that those cases are not merely expressions of philosophical ideals; they are determinations of how Idaho law operates and conclusions about what facts the State must prove in order to overcome the constitutional presumption of innocence in cases of accomplice liability. In those cases, both the Idaho Supreme Court and the Idaho Court of Appeals explain that the reason an accomplice can be found guilty, and thus, held liable, as though he were a principal, is that the accomplice shares the criminal intent of the principal. See, e.g., *Scroggins*, 110 Idaho at 386; *Mitchell*, 146 Idaho at 383. Thus, they hold that one of the elements the State has to prove when it files charges under

this type of accomplice liability is that the defendant shared the criminal intent of the principal. *Id.* Therefore, applying the rule of *stare decisis*,¹ to prove that element, the knowledge, the intent, of the principal (Ms. Holloway) is relevant. That means, regardless of the State's philosophical perspective of the law, the prosecutor still misstated the law in her closing argument to the jury.

Finally, the State applies the wrong standard in trying to argue that error was harmless. Specifically, the State contends, "because of the overwhelming evidence against [Mr.] Mauro, including his recorded confession, would have led the jury to the same result." (Resp. Br., pp.8-9.) However, the United States Supreme Court has specifically rejected such analysis in the harmless error context. *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993); *see also State v. Perry*, 150 Idaho 209, 227 (2010) (adopting the United States Supreme Court's test for harmless error in regard to objected-to errors). According to the *Sullivan* Court: "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict surely would have been rendered," because "to hypothesize a guilty verdict that was never in fact rendered—*no matter how inescapable the findings to support that verdict might be*—would violate the jury-trial guarantee." *Sullivan*, 508 U.S. at 279 (emphasis added). That is exactly what the State is asking this Court should do in this case – usurp the jury's role and hypothesize a

¹ *Stare decisis*, not *summum bonum*, is the rule that Idaho courts follow when evaluating controlling precedent on a question of law. *See, e.g., Greenough v. Farm Bureau Mut. Ins. Co. of Idaho*, 142 Idaho 589, 592 (2006). The State has made no argument that the opinions on which Mr. Mauro relies are manifestly wrong or should be overruled. (*See generally* Resp. Br.) Therefore, regardless of the State's philosophical perspective, this Court should follow the answer to the question of law set forth in controlling precedent like *Scroggins*.

guilty verdict based on this Court's own weighing of the evidence. This Court should reject that improper request to violate Mr. Mauro's constitutional right to a jury trial.

Rather, the proper standard for evaluating harmless error is for this Court to determine "whether the guilty verdict actually rendered in *this trial* was surely unattributable to the error." *Id.* (emphasis from original); see also *Perry*, 150 Idaho at 221 (reiterating that the State must prove the error is harmless beyond a reasonable doubt). Applying that standard, the State has failed to prove, beyond a reasonable doubt, that the verdict in this case was surely unattributable to the prosecutor's misconduct. In fact, though the State does not address it (see *generally* Resp. Br.), the Idaho Supreme Court addressed the question of harmless error as it relates to jury decisions and the black box that surrounds the jurors' deliberations in *State v. Luke*, 134 Idaho 294, 301 (2000). The *Luke* Court explained, where the jury could have reached its verdict by using one of two analyses, one proper and one not, it is not possible to determine which analysis the jurors used. *Id.* Therefore, the *Luke* Court held, in such cases, "this court *must* vacate the conviction and remand the case for a new trial." See *id.* (emphasis added). Essentially, because of the black box surrounding jury deliberations, there is a reasonable doubt that the improper analysis contributed to the verdict the jury actually rendered in this case.

The same situation exists in Mr. Mauro's case. There were two legal theories the jurors could have used to reach their verdict: (1) the prosecutor's flawed theory, under which the jury could convict Mr. Mauro on an accomplice theory of liability without finding that he shared the criminal intent of the principal, Ms. Holloway; or (2) the proper theory of liability set forth in *Scroggins* and *Mitchell*. Because it is not possible to know

upon which theory the jurors in this case based their verdict, the State has failed to carry its burden to prove the error, the prosecutorial misconduct which brought the flawed theory into play, was harmless beyond a reasonable doubt. Therefore, as in *Luke*, the conviction should be vacated because of the error in this case.

CONCLUSION

Mr. Mauro respectfully requests this Court vacate the judgment of conviction and remand this case for a new trial.

DATED this 19th day of January, 2017.

_____/s/_____
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of January, 2017, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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BRD/eas